

**IN THE WATER TRIBUNAL  
(HELD VIRTUALLY)**

**CASE NO: WT04/19/WC**

**In the appeal of:**

**SHPRITE CHECKERS PTY LTD**

Appellant

And

**DEPARTMENT OF WATER AND SANITATION**

First Respondent

**BERG-OLIFANS CMA**

Second Respondent

**Hearing date: 20<sup>th</sup> July 2021**

**Judgement delivered on: 2<sup>nd</sup> August 2021**

**Panel: Mr. R Mokgalabone (Presiding Officer)**

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**RULING AND ORDER**

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**INTRODUCTION**

1. All the parties were represented at the hearing, which was held virtually on the 20<sup>th</sup> July 2021.
  
2. This is an appeal brought to the Water Tribunal in terms of section 148(1) (f) of the National Water Act of 1998, against a decision of the Department of Water and Sanitation (hereafter referred to as the First Respondent). The First Respondent declined to issue a water use license in favour of the Appellant for its GB Mall, Erf 35299, situated at Gordons Bay, City of Cape Town Metropolitan Municipality, Western Cape (hereafter referred to as the City of Cape Town). The said application for a water use license was brought under application number: 27/2/2/G1022/1/1.

3. The Appellant based its appeal to the Water Tribunal on the following grounds:

3.1. The Appellant proved through a recent yield test that the borehole could sustainably be pumped to yield the required WULA volume of 9460.8m per annum. The communication with the case officer also indicated that the Reserve calculation was redone and the results indicating that there was a volume to allocate to this application.

3.2. Capital investment and potential losses (failure to consider the socio-economic effect of not authorizing the WULA) - the City of Cape town is still in water restrictions (level 3) with GN41381 (dated 12 January 2018) and GN41317 (dated 12 December 2017) also still in effect. There is currently no guarantee from the City of Cape Town that they can bring alternative water resources within the next two years. The projected growth for the City of Cape Town with the predicted effects from global warming becoming more evidence, as average annual rainfall for the area keeps decreasing, the Appellant is therefore forced to look for alternative water sources in order to minimize business risk and secure operational stability to its operations and tenants at its facilities.

4. The appeal is opposed by the Department of Water and Sanitation and the Berg-  
Olifans Catchment Management Agency ( hereafter referred to as the First  
Respondent and Second Respondent, respectively or jointly, as the  
Respondents).

### **BACKGROUND AND FACTS OF THE CASE**

5. The facts below are based on some of the Appellant's pleaded case, in the notice of appeal. These are some of the common-cause facts in this matter.

6. The Appellant became the landowner of erwen 5116 and 5117 in 2008 and subsequently developed the GB Mall after subdividing and consolidating certain sections of the erwen to eventually end up with Erf 35299. The site is located on Sir Lowry's Pass Road, Fairland, with the surrounding area mostly comprising of housing developments. The site development plan (SDP) shows the shopping centre layout, as well as the landscaping and irrigation plans.
7. The BG Mall will has Checkers, as a tenant, as well as other small shops, as tenants. The main users of the water inside the mall are Checkers, the coffee shop and ablution facilities. The landscaping and irrigation system are other consumers of water.
8. The Appellant initially applied for the registration of the General Authorization (GA) of the section 21(a) water use for the abstraction from a borehole site, in order to establish the landscaping on site while the WULA was in progress with the First Respondent. The GA was granted for a volume of 1 054m per annum on 23<sup>rd</sup> October 2017. According to the Appellant, this volume was insufficient for the entire site.
9. The site, Erf 35299 lies within catchment G22K, namely the Berg-Olifans Water Management Area. The acquirer underneath the site is said to be fractured with an average borehole yield potential of 0.5-2 litres per second. The WULA abstraction volume from the borehole on site was amended from 11 315m per annum in the initial application to 9 460.8m per annum based on the re-done yield test in March 2019.
10. The water quality on site is such that it must go through a reverse osmosis plant before it can be used on site as a potable source. Of the available 25.92m per day abstracted for use on site, 23.5m per day will pass through reverse osmosis plant. Of the 23.5m treated in one day, approximately 30% is disposed to sewer as brine resulting in 17.45 per day from the treatment plant at potable standard. The untreated 2.42 per day is blended with 3.95m of treated water and used for

irrigation, leaving 13.5 per day available for potable use within the centre. The said breakdown is as follows:

- 10.1. Total water abstracted per day: 25.92 m per day.
- 10.2. Total irrigation use per day; 6.42m per day.
- 10.3. Total potable use per day: 13.5m per day.
- 10.4. Total brine disposed to sewer per day: 7m per day.

11. Water saving initiatives were designed into the SDP for the site and implemented on site as part of the operational aspects. This was to ensure that the minimum would need to be abstracted from the borehole and that use on site would be sustainable and efficient. Irrigation initiatives include:

13.1 All irrigation nozzles are wastewater/hard water compliant and the entire irrigation system is run via a 'hunter decoder controller.

13.2 The landscaping on site makes use of endemic and indigenous plants in the design and a meter is used to reduce abstraction and irrigation during rain fall periods via a 'hunter weather station', which measures dampness levels in the soil, wind direction and speed, as well as switching off irrigation system when it rains.

13.3 The landscaping design complies with the minimum requirements by the City of Cape Town in order to minimize the overall need for irrigation. The irrigation system is on a timer to keep the minimum irrigation needs and times, with seasonal adjustments and after growth in period adjustments and the design minimises losses through the use of the hunter matched precipitation nozzles.

13.4 Irrigation is split between trees and shrubs/groundcovers, which allows the isolation of trees only if the shrubs/groundcovers does no need irrigation and vice-versa.

12. As part of the WULA, the Appellant also submitted the WSI application and brine disposal application to the City of Cape Town.

## **APPELLANT'S GROUNDS OF APPEAL**

### **The first ground of appeal**

13. The Appellant dispute the reason given by the First Respondent that "*catchment G22K is stressed and there is no water to allocate new user*". The Appellant disputes this reason by the First Respondent based on yield testing completed on the borehole and communications received from the First Respondent. The initial borehole testing indicated a yield of 3 789 litres per hour, but as the testing method did not comply with the SABS standards, I was requested that the Appellant conduct further tests. The testing was completed in March 2019 and the results submitted with the resultant amendment of the volume requested for the WULA application from 11 315m per annum in the initial application to 9 460.8 per annum in the amended submission. The testing was completed in March when rainfall is very low. The calculations in the geohydrological report for the available drawdown to ensure that the flow regime described by the analytical solution is not extrapolated beyond its applicable depth, as this way may result in an overuse of the resource. A two-year extrapolation time without recharge to the aquifer was also selected to account for potential draught conditions.

14. The communication from the First Respondent indicated that the initial reserve determination indicated the volume was not available for allocation, but after the reserve was recalculated, required volume of water available. No indication was provided from the officials of the First Respondent that the catchment would be stressed by the adjusted WULA volume based on this, if the yield testing was done by the Appellant, the submission would be considered. The appellant received a letter declining the initial WULA volume while in the process of completing the testing as agreed with the First Respondent, in the discussion with officials of the First Respondent, it was revealed that the initial letter was sent out before the reserve was recalculated and that the re-testing of the yield of the

borehole can still be submitted for consideration by the First Respondent along with any information required. The Appellant was advised by the First Respondent to ignore the decline letter and proceed with the submission of the additional information.

15. The Appellant submitted the temporary brine permit, the new yield and quality test, the breakdown of water usage on site, proof of WSI submission, as part of the additional information. All additional information on phase 4 of e-WULA was submitted to the First Respondent on the guidance of the First Respondent. Although the First Respondent indicated that there was volume available from the reserve, the application for a water use license was declined.

### **Second ground of appeal**

16. The Appellant argues, as a second ground of appeal, that the First Respondent failed to consider the socio-economic effects of not granting the water use license. Between 2015 and 2017, the Western Cape experienced three consecutive low rainfalls. By the summer of 2017/2018, the possibility of the City of Cape Town running out of water was very real. Members of the public and business were forced to look for alternative sources of water, as 'day-zero' drew near.

17. As part of its drought response, the Appellant developed a water crisis strategy. This entailed minimising the negative impact of water restrictions and municipality water being suspended through locating and securing alternative groundwater sources and putting the necessary infrastructure in place to treat and utilize the water.

18. During the drought season, the Appellant suspended irrigation and all landscaping sites in order to minimize the strain on municipality water. Other measures which were implemented by the Appellant, in an effort to save water, were the suspension of hand washing in ablution facilities and providing sanitisers; restricting access to external taps by installing tap locks; reusing

water bled from centralised air conditioning plants; installing low flow aerators on internal taps and showers and installing dual-flush simulation. The Appellant also installed tanks at 123 operational sites in the City of Cape Town area in order to provide backup supply via tanks should supply from the City of Cape Town be suspended.

19. During the draught period, the City of Cape Town continued to impose restrictions on water usage. If the Appellant did not or does not secure water of its own, the water shortages, brought about by the draught and water restrictions will negatively affect the Appellant's business operations, thereby severely affecting the Appellant financially.

### **THE FIRST AND SECOND RESPONDENT'S CASE**

20. As indicated above, the First and Second Respondent were opposing this appeal brought by the Appellant.

### **PRE-TRIAL CONFERENCE**

21. On the 15<sup>th</sup> July 2021, all the parties in the matter held a pre-trial conference, via a virtual platform and the pre-trial conference was chaired by the Chairperson of the Water Tribunal, Adv. N Maake (Adv. Maake). The pre-trial conference was held on the said date from 14h00 to 17h00, The following transpired at the pre-trial conference:

- 21.1. The parties agreed to settle the dispute between them amicably.
- 21.2. The parties prepared a pre-trial minute.
- 21.3. The parties prepared a settlement agreement.

22. The attendance register and the full details of the pre-trial conference are contained in the pre-trial minute, dated the 20<sup>th</sup> July 2021 and the pre-trial minute has been filed in the Water Tribunal file.

## **OUTCOME OF THE HEARING**

23. On the date of the hearing being the 20<sup>th</sup> July 2021, the parties informed the Chairperson of the hearing that subsequent to a pre-trial conference held on the on the 15<sup>th</sup> July 202, which was chaired by Adv. Maake, he parties have agreed to resolve the dispute amicably and therefore there is no longer a need for a full hearing of the matter.
24. The parties further indicated that, at the said pre-trial conference, the parties prepared a pre-trial minute and a settlement agreement.
25. The pre-trial minute, as well as the settlement agreement were signed by the parties on the 20<sup>th</sup> July 2021.
26. After the pre-trial minute and the settlement agreement were signed by the parties, the said documents were presented to the Chairperson of the hearing, by consent of all the parties involved in the matter.
27. All the parties to the dispute then requested the Chairperson of the hearing to confirm the settlement agreement as an order of the Water Tribunal.

## **ORDER**

28. The following order is hereby handed down:

28.1. The dispute between the parties has been settled, in terms of the settlement agreement, signed by all the parties to the dispute, dated the 20<sup>th</sup> July 2021. The settlement agreement has been filed in the Water Tribunal's file.



28.2. By consent between all the parties, the Settlement agreement dated the 20<sup>th</sup> July 2021 is hereby made an order of the Water Tribunal and therefore binding on all the parties in this matter.

**Thus handed down in Pretoria on the 2<sup>nd</sup> August 2021**



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**Mr R Mokgalabone**  
**Presiding Officer**

Appearances:

**For the Appellant:**

Ms Amanda Fritz-White  
Mr Paul Slabbert

**For the First and Second Respondents:**

Mr Jupsie Harish  
Ms Pebetsi Magolego  
Ms Lindiwe Seshuba

